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No. 08-742

Supreme Court, U.S.
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In The

Supreme Court of the United States

KAREN JESENSKY and ANTHONY JESENSKY,

Petitioners,

vs.

DUQUESNE LIGHT CO. and McCARLS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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December 8, 2008

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QUESTIONS PRESENTED

1. Whether a private contractor whose contract performance is closely supervised by an officer or agency of the United States may invoke the federal officer removal statute with respect to a state law action based upon conduct not specifically directed by the government?

2. Whether a Court of Appeals may affirm a grant of summary judgment in a case removed from state court without addressing a substantial question as to the existence of federal subject matter jurisdiction?

PARTIES TO PROCEEDING BELOW

Karen Jensensky and Anthony Jesensky, Appellants, vs. Duquesne Light Co., Gateway Industrial Supply, McCarls, Inc. and Thiem Corp., Appellees.

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OPINIONS BELOW

The Opinion entered July 11, 2008 by the United States Court of Appeals for the Third Circuit (reproduced at App. 1) and the Magistrate Judge's Report and Recommendation on Plaintiffs' Motion to Remand entered May 29, 2003 by the United States District Court for the Western District of Pennsylvania (reproduced at App. 11) are not reported.

STATEMENT OF JURISDICTION

The Judgment sought to be reviewed was entered by the Court of Appeals on July 11, 2008. Petitioners' Petition for Rehearing was denied on September 9, 2008. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under

> that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a)(1).

INTRODUCTION

In *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301, 2308 (2007), this Court expressly reserved examination of "whether and when particular circumstances may enable private contractors to invoke" the federal officer removal statute, 28 U.S.C. § 1442(a). The existence of federal jurisdiction in the present case turns squarely on the reserved question. The private contractor which removed this action was subject to close government supervision, but the United States did not direct the particular conduct that gave rise to the suit.

The Court of Appeals noted but did not address Petitioners' challenge to subject matter jurisdiction. Petitioners submit that this Court should either settle the jurisdictional question left open in *Watson*, or direct the Court of Appeals to address the issue in the first instance.

STATEMENT OF THE CASE

In 1994, Petitioner Karen Jesensky, then a 49-year-old nurse and mother of two, was diagnosed with mesothelioma, an almost invariably fatal cancer of the lung lining that is usually caused by exposure to asbestos.[1] Mrs. Jesensky had been exposed to asbestos on the clothing of her father, Eugene Schirra, a tradesman who worked at various industrial jobsites in and around Pittsburgh, Pennsylvania.

In the late 1950s Mr. Schirra worked at the conventional generator side of the Shippingport Atomic Power Plant, operated by Respondent Duquesne Light Co. ("Duquesne Light") under contract with the United States Atomic Energy Commission. The Shippingport plant was the first civilian nuclear plant, and its design and construction were supervised by Rear Admiral Hyman Rickover on behalf of the Atomic Energy Commission.

The Shippingport plant joined a nuclear reactor based upon those used by United States Navy vessels to a conventional electrical generation plant. Duquesne Light was selected to design, build and operate the conventional side of the Shippingport plant based on its extensive experience designing, building and operating many conventional power generation plants in and around western Pennsylvania.

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[1] Mrs. Jesensky remains alive some 14 years after her diagnosis. It is believed that Mrs. Jesensky is the longest-surviving mesothelioma patient.

All aspects of the Shippingport plant's design were subject to approval by Admiral Rickover's staff. Duquesne Light's Engineering Department created insulation specifications for the conventional power generator of the Shippingport plant, which called for extensive use of asbestos-containing insulation. Admiral Rickover's staff apparently approved the specifications without change.

Admiral Rickover gave no direction to Duquesne Light regarding the provision or content of warnings concerning the hazard of asbestos on the Shippingport premises. Duquesne Light did not provide any warning, nor did it otherwise protect business invitees (such as Mr. Schirra) or their households against the asbestos it had caused to be on the premises.

In January, 1996 Mrs. Jesensky and her husband, Petitioner Anthony Jesensky, filed suit in the Court of Common Pleas of Allegheny County against Duquesne Light, Mr. Schirra's one-time employer Respondent McCarls, Inc. ("McCarls"), and various other entities alleged to be responsible for her exposure to asbestos. In April, 1996 Duquesne Light removed the action to the United States District Court for the Western District of Pennsylvania, purportedly pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(1). In May, 1996 Petitioners moved to remand the action to state court, contending that the removal was improper and that the federal court lacked subject matter jurisdiction.

In August, 1996 the Judicial Panel on Multidistrict Litigation transferred the action to the Eastern District of Pennsylvania, in keeping with its standard practice in asbestos cases. Over the following six years, despite Petitioners' requests for a hearing or a ruling, the transferee court never ruled upon Petitioners' remand motion. Instead, the court eventually recommended transfer of the case back to the Western District of Pennsylvania, which was effectuated by the Judicial Panel of Multidistrict Litigation in August, 2002.

In February, 2003, Petitioners filed a renewed motion to remand the case to state court for lack of subject matter jurisdiction. On July 1, 2003 the District Court adopted a May 29, 2003 Report and Recommendation of a Magistrate Judge to deny the remand motion. On February 27, 2004 the District Court granted summary judgment for Duquesne Light on the ground that a premises operator owed no duty under Pennsylvania law to protect members of the household of a business invitee against hazards transported from the premises on the invitee's clothing.[2] The District Court also granted summary judgment for McCarls.

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[2] Pennsylvania's appellate courts have not ruled on the question of duty to household members. The Court of Common Pleas from which this action was removed has held, contrary to the ruling of the District Court herein, that such a duty is recognized under Pennsylvania law. *See Siemon v. A.O. Smith*

(Continued on following page)

After claims against other defendants were settled or otherwise disposed of, the District Court entered final judgment on May 23, 2006. Petitioners appealed to the United States Court of Appeals for the Third Circuit. A principal ground for the appeal was Petitioners' contention that the District Court lacked subject matter jurisdiction because the causal nexus and colorable federal defense elements of the federal officer removal statute were not met. The Court of Appeals noted Petitioners' contention that removal was improper, but did not rule upon that contention, and instead affirmed the entry of summary judgment based upon a purported insufficiency of the pleadings.[3]

Corp., No. GD 06-9079 (Ct. Comm. Pl. Alleg. Co., Pa. Oct. 19, 2006), App. 34.

[3] The pleading ground for dismissal invoked by the Court of Appeals was not passed upon by the District Court, and was not applicable in the court wherein this action was originally filed. *See* Pa. R. Civ. P. 1028, 1041.1 (limiting grounds for challenge to pleading in asbestos action).

ARGUMENT

1. Application of the Federal Officer Removal Statute to a Private Contractor Subject to Close Government Supervision but not Specific Direction of the Conduct Giving Rise to Suit is an Important Question of Federal Law that Should be Decided by this Court.

Federal officer removal under 28 U.S.C. § 1442(a)(1) requires that the removing party has acted under a federal officer or agency; that there is a causal nexus between the removed claims and the acts under color of federal office; and that the removing party asserts a colorable federal defense. *See, e.g., Mesa v. California*, 489 U.S. 121, 124-35 (1989).

In *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007), this Court held that a private company's compliance with detailed federal regulations is insufficient to satisfy the requirement that a person must be "acting under" an officer or agency of the United States in order to invoke federal officer removal. In so holding, this Court distinguished a line of lower court cases, exemplified by *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), which allowed removal by private contractors producing items for the government under close supervision. Because the removing party in *Watson* was not a government contractor, this Court concluded that "we need not further examine here (a case where private contracting is not at issue) whether and when particular circumstances may

enable private contractors to invoke the statute." *Watson*, 127 S. Ct. at 2308.

The present case does involve removal by a government contractor. By exercising jurisdiction (albeit without expressly addressing the issue), the Court of Appeals effectively held that a closely-supervised government contractor may remove a state law action arising out of performance of the contract *even though the particular conduct alleged to be in contravention of state law was not directed by the government.*

Here the aspects of Duquesne Light's conduct asserted to violate the common law duty of care – specification of asbestos insulation and failure to warn – were undertaken on Duquesne Light's own initiative, with the government merely approving Duquesne Light's insulation specifications without change and offering no direction with respect to warnings. This circumstance renders the present case at odds with *Winters*, in which the court held that both the "causal nexus" and "colorable federal defense" elements of the federal officer removal statute turn on whether the government directed the specific aspects of the contractor's conduct giving rise to the suit. *See Winters*, 149 F.3d at 398 ("The question we must determine is whether the government specified the composition of Agent Orange so as to supply the causal nexus between the federal officer's directions and the plaintiff's claims."); *id.* at 400 (holding that the same evidence establishing causal nexus also supports the proffered federal "government contractor

defense"). *But cf. Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 138 (2d Cir. 2008) (holding that "even if . . . the dioxin contamination occurred because of an act not specifically contemplated by the government contract, it is enough [to satisfy the causal nexus requirement] that the contracts gave rise to the contamination").

The invocation of the government contractor defense by the Court of Appeals absent government-imposed specifications requiring the particular conduct asserted to violate state law – *see* Court of Appeals Opinion at n.3, App. 7 – also places this case in conflict with this Court's seminal case adopting that defense, and with a leading case of another Court of Appeals applying that defense in the asbestos context. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (limiting government contractor defense to situations where state law duty creates "significant conflict" with requirements imposed under federal government contract); *In re Joint Eastern & Southern District New York Asbestos Litigation*, 897 F.2d 626, 630 (2d Cir. 1990) ("Boyle's requirement of government approval of 'reasonably precise specifications' mandates that the federal duties be *imposed* upon the contractor. . . . Put differently, under *Boyle*, for the military contractor defense to apply, government officials ultimately must remain the agents of decision.").

Petitioners submit that this Court should grant *certiorari* to settle the foregoing conflicts.[4]

2. By Failing to Address a Substantial Question as to the Existence of Federal Subject Matter Jurisdiction, the Court of Appeals has so Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Power.

This Court has long recognized the necessity for federal courts to enforce the limits of their own jurisdiction:

> Recalling a long and venerable line of our cases, [we] reiterated: The requirement that jurisdiction be established as a threshold matter is inflexible and without exception;

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[4] Although the Court of Appeals designated its Opinion in this action as "non-precedential", it is nevertheless significant as it represents the only decision on these important issues by the court with appellate authority over the many thousands of asbestos cases consolidated in the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation. Removal by government contractors has become an increasingly popular tactic for asbestos defendants to achieve the real or perceived procedural advantages of federal adjudication. The failure of the Court of Appeals to address the jurisdictional issue results in *de facto* permission for removal of asbestos cases by government contractors in jurisdictions across the country.

> for jurisdiction is power to declare the law, and without jurisdiction the court cannot proceed at all in any cause.

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578 (1999) (internal citations, quotations, ellipsis and brackets omitted). In particular:

> On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask *and answer* for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.

Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884) (emphasis added).

Ordinarily, of course, the Court of Appeals duly complies with this stricture. *See, e.g.*, *Barton v. Curtis*, 497 F.3d 331, 333 (3d Cir. 2007) ("Barton responds that this court does not have jurisdiction, an issue we must address as a preliminary matter."); *Doherty v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 142 Fed. Appx. 573, 575 (3d Cir. 2005) ("If the District Court had no subject matter jurisdiction, *a fortiori,* this Court has no subject matter jurisdiction.").

However, in the present case the Court of Appeals departed from the usual course by inexplicably disposing of Petitioners' appeal on the merits without ever addressing the jurisdictional issue, even though

it acknowledged the parties' dispute over the propriety of removal. *See* Court of Appeals Opinion at n.3, App. 7.

Petitioners submit that the foregoing lapse by the Court of Appeals gives rise to an appropriate occasion for this Court to exercise its supervisory powers by directing the Court of Appeals to reconsider this action, and to address specifically whether the District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1442(a)(1).[5]

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[5] Moreover, if the failure of the Court of Appeals to address the removal issue diminishes the utility of this case as a vehicle for this Court's examination of a private contractor's invocation of the federal officer removal statute, Petitioners respectfully suggest that this shortcoming may appropriately be remedied by a remand to the Court of Appeals with instructions to decide the threshold jurisdictional issue in the first instance.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3102

KAREN JESENSKY and
ANTHONY JESENSKY her husband,

Appellants

v.

A-BEST PRODUCTS, in its own right and as successor-in-interest to Asbestos Products Company; NICHIAS CO.; SAFETY-FIRST INDUSTRIES, INC. in its own right and as successor-in-interest to Safety First Supply, Inc.; ALLIED GLOVE CORP.; NORTH AMERICAN REFRACTORIES; GENERAL REFRACTORIES COMPANY; DRESSER INDUSTRIES, INC. and its division Harbison-Walker Refractories; CHICAGO FIREBRICK COMPANY; PLIBRICO COMPANY; *THIEM CORPORATION and its division, Universal Refractories; OGLEBAY NORTON COMPANY and its division, Ferro Engineering; FOSECO, INC.; SEEGOTT, INC.; HEDMAN MINES, LTD; INSUL COMPANY, INC; PITTSBURGH METALS PURIFYING COMPANY; PETERSON CANVAS PRODUCTS; ANCHOR PACKING; GARLOCK, INC.; ARGO PACKING COMPANY; DURAMETALLIC CORP.; DURABLA MANUFACTURING COMPANY in its own right and as successor to Durabla Canada, Ltd.; GOODYEAR TIRE & RUBBER COMPANY, INC.; UNIROYAL, INC. also

known as THE UNIROYAL GOODRICH TIRE COMPANY; BIGELOW-LIPTAK CORPORATION; BEAZER EAST, INC. in its own right and as successor to Koppers Co., Inc., and other related companies including Thiem Corp., Beazer USA, Inc., and Beazer, PLC; GRANT WILSON, INC; PITTSBURGH CORNING CORPORATION; OWENS-CORNING FIBERGLAS CORPORATION; THE ROCKWOOL MANFACTURING COMPANY; ADIENCE, INC. sucessor-in-interest to Adience Company, LP, as successor to BMI, Inc.; THE MARMON GROUP, INC. in its own right and successor-in-interest to the Cerro-Marmon Corp., Cerro Corp., Cerro Wire & Cable Co., Inc., The Rockbestos Co. and The Rockbestos Products Corp.; *GATEWAY INDUSTRIAL SUPPLY; F.B. WRIGHT COMPANY, INC.; RAPID-AMERICAN CORP. in its own right and as successor-in-interest to The Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company, Panacon Company and Glen Alden Corporation; GEORGE V. HAMILTON, INC.; TOWNSEND & BOTTUM, INC.; AC&S, INC.; SAUER, INC.; HINCHLIFFE & KEENER, INC.; ROBERTSON CECO CORPORATION, formerly known as H.H. ROBERTSON COMPANY; H.B. FULLER COMPANY in its own right and its division Foster Products Corporation; ASBESTOSPRAY CORPORATION; UNITED STATES MINERAL PRODUCTS COMPANY; W.R. GRACE COMPANY in its own right and as successor to Zonolite Company; ATLAS INDUSTRIES, INC.; EARL B. BEACH COMPANY also known as THE EARL B. BEACH CO. OF PHILADELPHIA also known as THE EARL B. BEACH CO.

OF PHILADELPHIA, PLC; FLINTKOTE COMPANY; GENERAL MOTORS CORPORATION; GENERAL ELECTRIC COMPANY and its Wire & Cable Division; WESTINGHOUSE ELECTRIC CORPORATION; GREENE TWEED & COMPANY; INGERSOLL-RAND; M.H. DETRICK COMPANY subsidiary of Detrick Companies, Inc.; QUAKER STATE CORPORATION; RILEY STOKER CORPORATION; UNION BOILER COMPANY; FOSTER WHEELER CORPORATION; SEPCO CORPORATION; MCCARLS, INC.; PENNSYLVANIA ELECRIC COMPANY; INDUSTRIAL INSULATION SALES, INC.; CONGOLEUM CORPORATION a subsidiary of American Biltrite, Inc.; THE CARBORUNDUM COMPANY; DUQUESNE LIGHT COMPANY; FAIRMONT SUPPLY COMPANY; RUTLAND FIRE CLAY SUPPLY COMPANY; COOPER INDUSTRIES, INC. in its own right and as successor-in-interest to McGraw-Edison, Co., Wagner Electric Corp., Studebaker Worthington, Inc., Edison International, Inc., and Tung Sol Electric, Inc.; PENNSYLVANIA INDUSTRIAL SUPPLIES COMPANY; J.H. FRANCE REFRACTORIES COMPANY.

*Per Clerk's Order of 1/*5/07.

On Appeal from the United States District Court
for the Western District of Pennsylvania,
D.C. Civil Action No. 96-cv-0680
(Honorable Ila Jeanne Sensenich).

Argued April 17, 2008
Before: SCIRICA, *Chief Judge*, AMBRO and FISHER, *Circuit Judges*.

(Filed July 11, 2008)

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National Association of Manufactures,
American Insurance Association,
Property Casualty Insurers Association of America,
American Chemistry Council.

OPINION OF THE COURT

SCIRICA, *Chief Judge*.

Appellant Karen Jesensky[1] asserts claims for injuries allegedly suffered as a result of exposure to asbestos fibers her father inadvertently carried home from his workplace. The District Court granted summary judgment in favor of defendants McCarl's, Inc. and Duquesne Light Company. We will affirm.

Eugene Schirra, a union steam fitter and pipe fitter for nearly thirty years, worked as a contractor at several industrial sites. During that time period, his daughter, Karen Jesensky, regularly loaned her car to him for a work carpool, picked him up from his bus stop after work, and washed his work clothes. In late 1994 or early 1995, Jesensky was diagnosed with mesothelioma, seriously impairing her health.

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[1] Jesensky's husband also asserts claims relating to the injuries sustained by Karen Jesensky.

Jesensky filed claims against sixty-nine defendants in the Pennsylvania Court of Common Pleas. She alleged her mesothelioma was caused by second-hand exposure to asbestos products present at her father's workplaces. Most of the defendants were manufacturers or suppliers of asbestos products.[2]

Two defendants – McCarl's and Duquesne Light – were neither manufacturers nor suppliers of asbestos products. Jesensky's claims against McCarl's allegedly arise out of a four-month period during which McCarl's employed Schirra at Babcock & Wilcox's steel mill in Koppel, Pennsylvania. Jesensky's claims against Duquesne Light Company arise out of a four-year period in which Schirra worked at the Shippingport Atomic Power Station. The Shippingport power plant, which used a nuclear reactor as a source for generating commercial electricity, was overseen by the Atomic Energy Commission ("AEC") in exercise of its authority under the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.* Duquesne Light Company contracted with the AEC to participate in the construction and operation of the power plant.

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[2] Jesensky's claims against most of these defendants were either settled or dismissed in state court for Jesensky's failure to proffer evidence showing that her father was in contact with particular products. *See Eckenrod v. GAF Corp.*, 544 A.2d 50, 52 (Pa. Super. Ct. 1988) (to survive a motion for summary judgment in an asbestos case, a plaintiff must establish that injuries were caused by the product of a particular manufacturer or supplier and must present evidence to show that he/she inhaled asbestos fibers shed by the specific product).

Schirra worked at the Shippingport power plant as an independent contractor of Duquesne Light Company.

Jesensky's complaint, originally filed in the Pennsylvania Court of Common Pleas, was removed by Duquesne Light under the federal officer removal statute, 28 U.S.C. § 1442(a)(1).[3] In District Court, Duquesne Light moved for summary judgment, contending that Jesensky's complaint failed to properly plead a claim, and if a claim had been properly pleaded, that it owed no duty to Jesensky under Pennsylvania law. The Magistrate Judge interpreted Jesensky's complaint as asserting a claim of negligence, predicated on a premises liability theory, without discussing the sufficiency of the pleadings. Reaching the merits, the Magistrate Judge recommended granting Duquesne Light's motion, finding

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[3] Removal under 28 U.S.C. § 1442(a)(1) is proper if the moving party: (1) demonstrates that it acted under the direction of an officer of the United States; (2) demonstrates a causal nexus between Plaintiffs' claims and the acts it performed under color of federal office; and (3) raises a colorable federal defense. *See Mesa v. California*, 489 U.S. 121, 124-35 (1989). Duquesne Light Company contends removal was proper here because, in constructing and operating the Shippingport power plant, it: (1) acted under the supervision and specific direction of Rear Admiral H.G. Rickover, Director of the Division of Naval Reactors of the AEC and his assigned officers; (2) followed Admiral Rickover's express orders in designing, constructing and operating the plant; and (3) indicated its intent to pursue the "government contractor defense" articulated in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). Jesensky contends removal was improper and seeks remand to state court.

the company owed Jesensky no duty under Pennsylvania law. The District Court, adopting the Magistrate Judge's Report and Recommendation, granted summary judgment in favor of Duquesne Light Company without further comment.

McCarl's also moved for summary judgment in District Court, contending that it had not been identified as a source of any asbestos exposure that allegedly injured Jesensky. The Magistrate Judge, finding that Jesensky had not alleged any facts to support a negligence claim against McCarl's and indicating that no such claim could be found in the pleadings, recommended granting McCarl's summary judgment motion.[4] The District Court granted summary judgment in favor of McCarl's without further comment.

The District Court was correct to dismiss Jesensky's claims against McCarl's based on the insufficiency of the pleadings, and the same reasoning is dispositive as to the claims against Duquesne Light. In the briefs, Jesensky characterizes the complaint as asserting a claim for negligence based on the company's "failure to warn" of the dangers of the asbestos products used at its facility. *See, e.g.*, Jesensky Br. at 11 ("Although the Complaint in the present action is couched in terms principally applicable to product

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[4] The Magistrate Judge issued a Supplemental Report and Recommendation on the motion by McCarl's following Jesensky's filing of objections to the Magistrate Judge's initial Report and Recommendation.

defendants, the essential claim against Duquesne Light is predicated on its failure to warn or otherwise protect Mr. Schirra, and thus derivatively Ms. Jesensky, against off-premises transportation of asbestos fibers."). At oral argument, Jesensky noted "the essence of our theory was that it was a negligence premises liability case."

These state law claims are absent from Jesensky's complaint. On its face, the complaint is void of any reference to a premises liability claim or "failure to warn" theory.[5] At oral argument, Jesensky conceded the

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[5] The complaint alleges, in part:

> [¶] 7. Defendants, at all times relevant and pertinent hereto, were engaged in the business of mining and/or milling and/or manufacturing and/or fabricating and/or supplying and/or selling asbestos-containing products to which plaintiff was exposed. Specifically, in the case of defendant Foster Wheeler Corporation, this includes the utilization of asbestos-containing products in the construction and/or reconstruction and/or repair of boilers in powerhouses, industrial facilities and elsewhere.
>
> . . .
>
> [¶] 10. Plaintiff's diseases [sic] as set forth herein with associated complications was [sic] directly and proximately caused by the acts of the defendants acting through their agents, servants and employees and the defendants are liable therefore, jointly and severally, to the plaintiff for their negligence, breach of warranty and as a result of the strict duty and liability imposed under Section 402A of the Restatement (Second) of Torts.

(Continued on following page)

complaint's deficiency, stating: "it's true that that's not how we pled it; it was an inartful pleading." Moreover, Jesensky admitted at oral argument that the complaint "should have been amended. . . ."

Even so, Jesensky has not submitted a proposed amended complaint on this appeal. And there is no record of her having ever prepared or submitted a proposed amended complaint in the past. In a lawsuit that now dates back twelve years, we decline to permit amendment of the pleadings where the plaintiff has never moved to amend her complaint nor offered any explanation for her failure to do so.

For the foregoing reasons, we will affirm the District Court's grant of summary judgment in favor of Duquesne Light Company and McCarl's. Accordingly, the Jesenskys' claims against both defendants are dismissed without leave to amend.

[¶] 11. The defendants mined and/or milled and/or manufactured and/or fabricated and/or supplied and/or sold products which they knew were defective and/or unreasonably dangerous to the user or consumer, such as plaintiff, and acted in such a manner which was willful, wanton, gross and in total disregard for the health and safety of the user or consumer, i.e., plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

KAREN JESENSKY, ANTHONY JESENSKY, her husband, Plaintiffs vs. A-BEST PRODUCTS CO., et al., Defendants	)	Civil Action No. 96-680 Judge Robert J. Cindrich/ Magistrate Judge Ila Jeanne Sensenich Re: Doc. #135

MAGISTRATE JUDGES REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION TO REMAND

I. RECOMMENDATION

It is recommended that Plaintiff's motion to remand be denied.

II. REPORT

Plaintiffs bring this action against various defendants asserting that wife Plaintiff contracted mesothelioma as a result of being exposed to and inhaling asbestos dust and asbestos fibers as a result of the everyday care of her father, Eugene Schirra, including the washing of his work clothes. They allege that he had worked on numerous commercial and industrial jobsites for various contractors in Allegheny County and the surrounding area from 1943 until

1979 as a plumber/pipefitter. They filed this action in the Civil Division – Asbestos, of the Court of Common Pleas of Allegheny County, Pennsylvania on January 9, 1996 and Defendant Duquesne Light removed to this court on April 1, 1996. On August 1, 1996 this case was transferred to the United States District Court for the Eastern District of Pennsylvania. On August 19, 2002 this court received a certified copy of an order from the Judicial Panel on Multidistrict Litigation directing that all claims of Karen Jesensky be remanded to this court with the exception of severed claims for punitive damages or exemplary damages. This case was reopened on December 31, 2002.

Plaintiffs filed a motion to remand on February 12, 2003, asserting that Defendant Duquesne Light Co. (Duquesne) cannot establish the statutory prerequisites for removal pursuant to 28 U.S.C. § 1442(a) in that it cannot establish that their claims against Duquesne were undertaken at the express direction of a particular federal officer and that it does not assert a colorable claim of a federal defense. In the alternative, Plaintiffs move to remand to the State Court all claims against Defendants other than Duquesne and all claims against Duquesne which do not concern its conduct at the Shippingport Atomic Power Station.

Defendant Duquesne removed this action pursuant to 28 U.S.C. § 1442(a)(1) which provides as follows:

> (a) A civil action . . . commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office . . .

In their brief in support of their motion to remand Plaintiffs cite *Good v. Armstrong World Industries, Inc.*, 914 F. Supp. 1125, 1127 Pa. 1996) in support of their argument that Duquesne must show "that it acted under the direction of a federal officer, thereby demonstrating a causal nexus between plaintiffs' claims and the acts [Defendant] performed under color of federal office." Plaintiffs further cite the unpublished decision of *Feidt v. Ownes-Corning Fiberglas Corp.*, No. 96-434, *appeal dismissed*, 153 F.3d 124 (3d Cir. 1998) as supporting their argument that Duquesne's failure to produce evidence that its failure to warn of the danger of asbestos was undertaken at the express direction of a particular federal officer and failed to establish the required nexus between their failure to warn claim and actions taken by Duquesne at the direction of a particular federal officer. However, Defendant Duquesne notes in its brief that Plaintiffs' claims are not limited to a failure to warn claim. Plaintiffs' complaint, ¶ 4, alleges

"During the period of time set forth hereinabove, plaintiff was exposed to and did inhale asbestos dust and asbestos fibers, which caused the conditions as hereinafter set forth, resulting in plaintiff's impairment." Further, in ¶ 10 Plaintiffs allege "Plaintiff's diseases as set forth herein with associated complications was directly and proximately caused by the acts of the defendants acting through their agents, servants and employees and the defendants are liable therefore, jointly and severally, to the plaintiff for their negligence, breach of warranty and as a result of the strict duty and liability imposed under Section 402A of the *Restatement (Second) of Torts.*

Causal Nexus between Plaintiffs' claims and the acts performed by Duquesne Light

Plaintiffs assert that it was Duquesne rather than the federal government that required the use of asbestos-containing materials. Their brief states that a document titled "Specifications for Thermal Insulating Materials for Shippingport Atomic Power Station Unit" "required the use of asbestos-containing material." They do not identify any page of that document, (which they identify as Exhibit D) which required the use of asbestos-containing material. They refer to the deposition of Frank M. Nadolny, Defendant Duquesne's corporate designee, as stating that that document **might** have been "Duquesne's ideas," referring to pages 46-49 of his deposition (emphasis added). The transcript of that deposition reveals that Mr. Nadolny agreed with counsel for Plaintiff that the

document **looked like** it had something to do with the turbine generator (Dep. p. 47) (emphasis added). Further, there was an indication on the document that it was prepared by Duquesne Light. (Dep. p. 48). He testified that it was his understanding that Duquesne Light did not design anything on its own without approval of the Atomic Energy Commission. (Dep. p. 49). This testimony does not establish that the specification for use of asbestos originated with Duquesne.

Defendant Duquesne admits it does not satisfy the requirements for removal pursuant to 28 U.S.C. § 1442(a)(1) if it establishes "only that the relevant acts occurred under the general auspices of a federal office or officer", citing *Ryan v. Dow Chemical Co.*, 781 F. Supp. 934, 947 (E.D.N.Y. 1992). (Def. br. p. 7). It notes that "several courts have held that removal must be predicated upon a showing that the acts upon which the suit is based were performed pursuant to (1) an officer's direct order or (2) comprehensive and detailed regulations." (Def. br. p. 7). Defendant appears to refer to a writing "History of Shippingport" authored by William Beaver, but does not identify it as appearing in the record. Therefore it cannot be considered in connection with Plaintiffs' motion to remand.

Defendant Duquesne does produce substantial evidence that a federal officer, Rear Admiral Hyman G. Rickover, the Director of the Division of Naval Reactors of the Atomic Energy Commission and his assistants exercised direct detailed control of the

Shippingport facility. Defendant Duquesne has submitted an affidavit by William J. O'Brien, (Def. Ex. 3) who was Maintenance Supervisor of the Shippingport Atomic Power Station from 1956 through 1965. He was also charged with refueling the reactor. He avers that the United States government, as the owner of the reactor plant, dictated what was done at the site and had procedures in place for virtually everything. The federal officer placed in charge of overseeing both the construction and operation of the reactor plant was Rear Admiral H.G. Rickover. Everything they did, specifically including every aspect of the design and construction of the plant had to be approved by the Atomic Energy Commission, specifically by Admiral Rickover or his designated officers. This included approval of the thermal insulation used at the plant. During construction Admiral Rickover conducted weekly inspections of the facility. During his inspections of the plant, Admiral Rickover examined everything, including health and safety issues, compliance with all plant procedures, radiation exposure levels, and how the plant's maintenance and operations people were going about their jobs. Based on his personal involvement in the construction and operation of the Shippingport Atomic Power Station, O'Brien stated that Admiral Rickover and his designated officers directed and controlled both the design and construction of the plant and had ultimate decision-making authority over specific plant procedures.

Defendants also refer to a voluminous document, Exhibit M as showing Admiral Rickover's direct

involvement in asbestos abatement programs and refer to his August 17, 1981 express disapproval and rejection of a recommended asbestos abatement program. That document reveals that Admiral Rickover disapproved a recommendation by the Bettis Atomic Power Laboratory of Westinghouse Electric Corporation that the deteriorating asbestos insulation in the Heat Dissipation System be encapsulated by coating with a sprayed on sealant. The need for it was discussed as follows:

> The asbestos insulation and lagging in the Heat Dissipation System Building and on Heat Dissipation System piping and components at Shippingport is deteriorating. In many areas the protective lagging is worn out and deteriorated insulation is loose and falling off of piping, components and insulated walls of buildings. Although the Heat Dissipation System is no longer used, Duquesne personnel regularly enter one of the Heat Dissipation System buildings to operate the site well water system. This loose asbestos is a potential health hazzard.

Admiral Rickover disapproved of the recommendation for the following reasons:

> The recommendation to encapsulate deteriorated insulation or the Heat Dissipation System is disapproved. The expense for this work is not considered warranted. Airborne asbestos levels in Heat Dissipation System buildings should continue to be measured as required by ref (c). Protective equipment

> should be utilized as required by ref (c). Also, the one Heat Dissipation System building for which access is not normally required should be locked to preclude unnecessary access.
>
> The action taken by this memorandum is considered by the Government to be within the contractual scope of existing contracts and does not authorize any delay in delivery or additional cost to the Government, either direct or indirect.

This document would appear to establish that Admiral Rickover directed the extent to which workers would be protected from exposure to asbestos, and would appear to establish a nexus between Plaintiffs' claims and the acts Duquesne performed under color of federal office.

Whether Duquesne Light has raised a colorable federal defense

The next question is whether Defendants raise a colorable federal defense. In its notice of removal, Duquesne Light indicated its intent to pursue the "government contractor defense." In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) the Court recognized the government contractors defense. The Court stated: "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the

equipment that were known to the supplier but not to the United States." Admiral Rickover's disapproval of the recommended asbestos abatement program would appear to provide a basis for the government contractor defense. Admiral Rickover was specifically advised that deteriorated insulation which was loose and falling off piping, components and insulated walls of buildings was a potential health hazard to Duquesne personnel who regularly entered one of the Heat Dissipation System buildings to operate the site well water system. Admiral Rickover's disapproval of the recommendation could be a basis for a finding of negligence under state law. His approval was based upon his determination that the expense for the work was not warranted. This would appear to present a conflict between state law and specific directions Defendants received from Admiral Rickover. Therefore Defendant Duquesne has raised a colorable federal defense.

Whether the Court should sever and remand the non-Shippingport Claims

Plaintiffs argue that this court has discretion to sever and remand the non-Shippingport claims pursuant to 28 U.S.C. § 1367(c)(2) and (4) and 28 U.S.C. § 1441(c). However those sections do not apply to this case because they specifically apply to claims over which this court has original jurisdiction. Therefore the court should not sever and remand the non-Shippingport claims.

It is recommended that Plaintiffs' motion to remand be denied.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ _____
ILA JEANNE SENSENICH
UNITED STATES
MAGISTRATE JUDGE

Date: May 29, 2003

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KAREN JESENSKY, ANTHONY JESENSKY, her husband, Plaintiffs	)	
vs.	)	Civil Action No. 96-680
A-BEST PRODUCTS CO., et al., Defendants	)	Judge Robert J. Cindrich/ Magistrate Judge Sensenich Re: Doc. #135

MEMORANDUM ORDER

On April 15, 1996, this case was referred to United States Magistrate Judge Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B), and Rules 71.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on May 29, 2003, recommended that Plaintiff's motion to remand be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on counsel for plaintiff and on counsel for defendant. No objections have been filed. After review of the report and recommendation, the following order is entered:

AND NOW, this 30 day of June, 2003;

IT IS HEREBY ORDERED that Plaintiff's motion for remand is denied.

The report and recommendation of Magistrate Judge Sensenich, dated May 29, 2003, is adopted as the opinion of the court.

/s/ Robert J. Cindrich
Robert J. Cindrich
United States District Judge

cc: Ila Jeanne Sensenich
U.S. Magistrate Judge

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3102

KAREN JESENSKY and
ANTHONY JESENSKY her husband,

Appellants

v.

A-BEST PRODUCTS, in its own right and as successor-in-interest to Asbestos Products Company; NICHIAS CO.; SAFETY-FIRST INDUSTRIES, INC. in its own right and as successor-in-interest to Safety First Supply, Inc.; ALLIED GLOVE CORP.; NORTH AMERICAN REFRACTORIES; GENERAL REFRACTORIES COMPANY; DRESSER INDUSTRIES, INC. and its division Harbison-Walker Refractories; CHICAGO FIREBRICK COMPANY; PLIBRICO COMPANY; *THIEM CORPORATION and its division, Universal Refractories; OGLEBAY NORTON COMPANY and its division, FERRO ENGINEERING; FOSECO, INC.; SEEGOTT, INC.; HEDMAN MINES, LTD; INSUL COMPANY, INC; PITTSBURGH METALS PURIFYING COMPANY; PETERSON CANVAS PRODUCTS; ANCHOR PACKING; GARLOCK, INC.; ARGO PACKING COMPANY; DURAMETALLIC CORP.; DURABLA MANUFACTURING COMPANY in its own right and as successor to Durabla Canada, Ltd.; GOODYEAR TIRE & RUBBER COMPANY, INC.; UNIROYAL, INC. also known as THE UNIROYAL GOODRICH TIRE COMPANY; BIGELOW-LIPTAK CORPORATION;

BEAZER EAST, INC. in its own right and as successor to Koppers Co., Inc., and other related companies including Thiem Corp., Beazer USA, Inc., and Beazer, PLC; GRANT WILSON, INC; PITTSBURGH CORNING CORPORATION; OWENS-CORNING FIBERGLAS CORPORATION; THE ROCKWOOL MANFACTURING COMPANY; ADIENCE, INC. sucessor-in-interest to Adience Company, LP, as successor to BMI, Inc.; THE MARMON GROUP, INC. in its own right and successor-in-interest to the Cerro-Marmon Corp., Cerro Corp., Cerro Wire & Cable Co., Inc., The Rockbestos Co. and The Rockbestos Products Corp.; *GATEWAY INDUSTRIAL SUPPLY; F.B. WRIGHT COMPANY, INC.; RAPID-AMERICAN CORP. in its own right and as successor-in-interest to The Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company, Panacon Company and Glen Alden Corporation; GEORGE V. HAMILTON, INC.; TOWNSEND & BOTTUM, INC.; AC&S, INC.; SAUER, INC.; HINCHLIFFE & KEENER, INC.; ROBERTSON CECO CORPORATION, formerly known as H.H. ROBERTSON COMPANY; H.B. FULLER COMPANY in its own right and its division Foster Products Corporation; ASBESTOSPRAY CORPORATION; UNITED STATES MINERAL PRODUCTS COMPANY; W.R. GRACE COMPANY in its own right and as successor to Zonolite Company; ATLAS INDUSTRIES, INC.; EARL B. BEACH COMPANY also known as THE EARL B. BEACH CO. OF PHILADELPHIA also known as THE EARL B. BEACH CO. OF PHILADELPHIA, PLC; FLINTKOTE COMPANY; GENERAL MOTORS CORPORATION; GENERAL ELECTRIC COMPANY and its Wire & Cable Division;

WESTINGHOUSE ELECTRIC CORPORATION; GREENE TWEED & COMPANY; INGERSOLL-RAND; M.H. DETRICK COMPANY subsidiary of Detrick Companies, Inc.; QUAKER STATE CORPORATION; RILEY STOKER CORPORATION; UNION BOILER COMPANY; FOSTER WHEELER CORPORATION; SEPCO CORPORATION; MCCARLS, INC.; PENNSYLVANIA ELECRIC COMPANY; INDUSTRIAL INSULATION SALES, INC.; CONGOLEUM CORPORATION a subsidiary of American Biltrite, Inc.; THE CARBORUNDUM COMPANY; DUQUESNE LIGHT COMPANY; FAIRMONT SUPPLY COMPANY; RUTLAND FIRE CLAY SUPPLY COMPANY; COOPER INDUSTRIES, INC. in its own right and as successor-in-interest to McGraw-Edison, Co., Wagner Electric Corp., Studebaker Worthington, Inc., Edison International, Inc., and Tung Sol Electric, Inc.; PENNSYLVANIA INDUSTRIAL SUPPLIES COMPANY; J.H. FRANCE REFRACTORIES COMPANY.

*Per Clerk's Order of 1/5/07

(D.C. Civ. No. 96-cv-0680)

SUR PETITION FOR PANEL REHEARING

(Filed Sept. 9, 2008)

Present: SCIRICA, *Chief Judge*, AMBRO and FISHER, *Circuit Judges.*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the

judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

DATED: September 9, 2008
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IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY,
PENNSYLVANIA

CECELIA M. SIEMON, an individual,	CIVIL DIVISION ASBESTOS
Plaintiff	NO. GD 06-9079
vs.	
A.O. SMITH CORPORATION, et al.,	
Defendants.	

ORDER OF THE COURT BY:
ROBERT J. COLVILLE

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IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY,
PENNSYLVANIA

CECELIA M. SIEMON, an individual,	CIVIL DIVISION ASBESTOS
Plaintiff	NO. GD 06-9079
vs.	
A. O. SMITH CORPORATION, et al.,	
Defendants.	

ORDER OF COURT

(Filed Oct. 19, 2006)

AND NOW, this 19th day of October, 2006, following briefing and oral argument on defendant, U. S. Steel Corporation's Motion for Summary Judgment Based on Lack of Duty, it is hereby ORDERED, ADJUDGED, and DECREED that said Motion is Denied. See § 371 of the Restatement of Torts (Second); *Hudson v. Grace*, 34 A.2d 498 (Pa. 1943); and *Westerman v. Stout*, 335 A.2d 741 (Pa. 1975).

This court finds *Hudson v. Bethlehem Steel Corp.*, 1995 WL 17778064 of (Pa. Com. Pl., Dec. 12, 1995) inapplicable as there appears to exist *prima facie* evidence in the record of this case that U. S. Steel knew or should have known of the danger to the plaintiff in this case.

With respect to the defendant's reliance upon the decisions of the highest courts of sister jurisdictions (Georgia, New York, and Texas), this court notes that while the factual basis for each of those decisions may be materially distinct from the factual evidence available at a trial in this matter, this court recognizes the defendant's reliance upon the decision of those courts and the assertion that the "developing trend across the nation" is to restrict the application of general principles of negligence and duty within the context of asbestos litigation. My decision today is in no manner intended to reject that assertion. It is not, however, the function of this court to create such distinctions under the law of Pennsylvania in the absence of clear direction from the appellate courts of Pennsylvania. Accordingly, while defendants may someday persuade the courts of Pennsylvania that the analysis employed by the Supreme Courts of Georgia, New York, and Texas constitute both the trend of the future and the appropriate course for Pennsylvania, the defendants must begin by persuading the appellate courts of Pennsylvania, not this trial court.

BY THE COURT:

/s/ Robert J. Colville
Robert J. Colville

Supreme Court, U.S.
FILED
FEB 9 - 2009
OFFICE OF THE CLERK

No. 08-742

IN THE

Supreme Court of the United States

KAREN JESENSKY and ANTHONY JESENSKY,

Petitioners,

v.

DUQUESNE LIGHT CO. and McCARLS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DUQUESNE LIGHT COMPANY

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MODIFIED QUESTIONS PRESENTED

1. Whether a [~~private~~] ***government*** contractor whose contract performance is closely supervised by an officer or agency of the United States may invoke the federal officer removal statute with respect to a state law action based upon conduct [~~***not***~~] specifically directed by the government?

2. Whether a Court of Appeals may affirm a grant of summary judgment in a case removed from state court without ***[~~addressing a~~] providing written analysis of an otherwise implied finding that there is no*** substantial question as to the existence of federal subject matter jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Respondent, Duquesne Light Company is wholly owned by Duquesne Light Holdings, Inc.

Respondent McCarls, Inc. is represented by other counsel.

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PERCEIVED MISSTATEMENTS OF FACT IN PETITIONERS' PHRASING OF "QUESTIONS PRESENTED"

As permitted by Supreme Court Rule 24.2, Respondent has rephrased the Questions Presented above because Petitioners' versions are perceived to contain misstatements of fact about what occurred in the proceedings below, and because Supreme Court Rule 15.2 requires Respondent to bring such matters to the Court's attention at the earliest possible occasion or risk having them deemed waived. In each of the Modified Questions Presented above, the amended language appears in bracketed, bold and italicized text to highlight the precise change that was made to Petitioners' phraseology.

First, the word "government" was substituted for the word "private" in the first Question Presented because it is undisputed that Duquesne Light was at all relevant times under direct contract with the Federal government, and hence, a government contractor. The remaining language removed from the first Question Presented read "not" specifically directed, and constituted a misstatement of fact because neither the United States Court of Appeals for the Third Circuit nor the District Court found as fact that the conduct at issue (i.e., Duquesne Light's use of asbestos-containing insulation) was not specifically directed by the government. Indeed, the Third Circuit made no written finding on this question at all and the District Court's opinion (which the Court of Appeals affirmed) found exactly the opposite fact to be true, as the record will reflect. *See:* Magistrate Judge's Report and

Recommendation – 5/29/03; *and* Order of the United States District Judge adopting the Magistrate Report and Recommendation as the opinion of the court – 6/30/03. App. 11-29. The Magistrate Judge's Report specifically rejected Petitioners' proposed finding that the conduct at issue was not specifically directed by the government. In addressing the one document upon which Petitioners relied in their attempt to establish that the specification for asbestos insulation originated with Duquesne Light, the Magistrate Judge wrote: "[Petitioners/Plaintiffs] do not identify any page of that document . . . which required the use of asbestos containing material." *See* App. 14. Likewise, the Magistrate Judge addressed the witness testimony upon which Petitioners relied for the same purpose: "This testimony does not establish that the specification for use of asbestos originated with Duquesne." *See* App. 14-15. In contrast, the Magistrate Judge found that Respondent, "Defendant Duquesne [did] produce substantial evidence that a federal officer . . . exercised direct detailed control of the Shippingport facility." *See* App. 15-16. "This included approval of the thermal insulation used at the plant." *See* App. 16. The Magistrate Judge was particularly convinced by the contents of one document that the government specifically directed Duquesne Light's use of asbestos-containing insulation. To the Magistrate Judge's eye "[t]his document would appear to establish that [the federal officer] directed the extent to which workers would be protected from exposure to asbestos . . ." *See* App. 17-18.

Petitioners' first Question Presented ignores the evidence of record and the District Court's factual

findings upon its review of that record. Petitioners' failure to accurately present this Question is, alone, a "sufficient reason for the Court to deny a petition" as provided in Supreme Court Rule 14.4. If it is Petitioners' intent to argue that the District Court's factual findings were erroneous, then they are asserting an error for which "[a] petition for writ of certiorari is rarely granted . . ." per the Court's Rule 10.

The language removed from the second Question Presented read "without addressing a." This too was perceived to be a misstatement because the Third Circuit *did address* the subject matter jurisdiction question, albeit without written analysis. Thus, the phrasing of the presented question was amended accordingly. The Third Circuit specifically acknowledged the jurisdictional question regarding the propriety of removal in Footnote 3. By considering the merits of the case and dismissing it on a procedural ground, the Third Circuit implicitly found subject matter jurisdiction based upon the analysis sufficiently expounded upon by the District Court in its Recommendation and Order. *See* App. 11-29. The real question, then, is whether it is reviewable error for the Third Circuit to fail to provide specific and written record of its analysis of every issue presented to it.

Again, Petitioners' failure to present this Question accurately is, in and of itself, a sufficient reason to deny the Petition for a Writ, per Rule 14.4. The Court of Appeals simply gave no indication that it ignored the jurisdictional question.

ARGUMENT

1. The Petition Does Not Present an Important Question of Federal Law that Should be Decided by this Court

Petitioners insist that their appeal presents an important question of federal law. However, they fail to explain why or how the question presented (inaccurately as noted above) is one that should be decided by the Court. Instead, Petitioners attempt to create an impression that this case presents a factual scenario for which this Court has been waiting. Petitioners attempt to persuade by seizing upon this Court's comment in *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007) that "whether and when particular circumstances may enable private contractors to invoke [the federal officer removal] statute" did not need to be examined under the facts of that particular case. *Watson* simply does not have the import which Petitioners attempt to assign. The *Watson* Court merely noted an obvious distinction between the private contractor in that action and the government contractor in the matter of *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998) That same distinction lies herein. It is undisputed that Duquesne Light was a government contractor. The right of a government contractor to remove a civil action under 28 U.S.C. Section 1442(a)(1) was fully analyzed by this Court in *Mesa v. California*, 489 U.S. 121 (1989). Duquesne Light's removal of the case *sub judice* falls squarely within the *Mesa* criteria established by the Court and further review of this case is unnecessary.

In addition, as explained in the preceding section, this case does not present the question that Petitioners contend it does. Namely, this case does not present the Court with an opportunity to clarify the causal nexus criteria of federal officer removal where the conduct at issue (i.e., Duquesne Light's use of asbestos-containing insulation) was not specifically directed by the government. As found by the District Court and affirmed by the Third Circuit by implication, Duquesne Light's conduct which gave rise to Petitioners' action was *specifically* directed by the government. Federal law is already well settled on the availability of federal officer removal under these circumstances. There is no pressing need for this Court's intervention.

2. The Petition Does Not Present Any Conflict Between United States Courts of Appeals on an Important Matter

Petitioners attempt to engineer two alleged conflicts between the Third Circuit's ruling and decisions of other circuits on the same issue. In the first instance, no such conflict exists since the Third Circuit did not provide a written analysis of its reasons for finding subject-matter jurisdiction (as addressed more fully hereafter) in its nonprecedential opinion. Nonetheless, even its implied finding that Respondent's removal under the federal officer statue was proper does not merit review by this Honorable Court. The Petition for Writ of Certiorari should not be granted because the conflicts raised by Petitioners either do not exist or are not presented by the case at hand.

a. There is No Conflict with *Winters* and/or *Isaacson*

The first conflict alleged by Petitioners is between this case and the *Winters* case. Petitioners accurately represent that in *Winters* the Fifth Circuit held that to establish the causal nexus required to justify removal under the federal officer removal statute, it must be demonstrated that the government directed the specific aspects of the contractor's conduct which gave rise to the suit. Petitioners reason that this holding conflicts with this case because the Third Circuit "effectively held" that the causal nexus requirement does not require such a showing. It is clear that the Third Circuit made no such holding, "effectively" or otherwise. This case does not conflict with *Winters* in any manner because in both instances the facts established that the conduct at issue *was* specifically directed by the federal officer and therefore the causal nexus requirement was satisfied.

The Third Circuit Court of Appeals affirmed, without quarrel, the District Court which found that Duquesne Light's use of asbestos-containing insulation *was* specifically directed by the government. Thus, the conflict with *Winters* alleged by Petitioners is wholly dependent upon Petitioners' own misstatement of the facts regarding what occurred in the proceedings below. Neither *Winters* nor this case presents a factual scenario whereby the conduct that was allegedly in contravention of state law was not directed by the government.

Petitioners also claim this same conflict exists between *Winters* and *Issacson v. Dow Chemical Co.*,

517 F.3d 129 (2d Cir. 2008), wherein the Second Circuit allegedly found that an act not specifically contemplated by the government contract was sufficient to satisfy the causal nexus requirement, and that it is enough that the government contract gave rise to the conduct. While the Petitioners' accurately quote the *Isaacson* case in this regard, it is clear that the quoted statements are dicta. Indeed, the quote relied upon by Petitioners begins with the words "even if ..." Such language clearly foreshadows that the facts to follow are not those which the court is actually contemplating in the case before them. In truth, the facts considered and the holdings reached in *Isaacson* are identical to the facts considered and the holdings reached in *Winters*, for all relevant purposes. In both *Winters* and *Isaacson*, the relevant facts were the degree of government control over the formulation and composition of Agent Orange. In both *Winters* and *Isaacson*, the courts of appeals found that the composition and formulation of Agent Orange were specifically directed by the government, and that the causal nexus requirement of federal officer removal was therefore met. As such, both *Winters* and *Isaacson* are in complete accord with each other and with this case, in that all three courts found specific direction by the government with respect to the conduct at issue. There is simply no conflict among the three cases and further review is not justified.

Further, no reviewable conflict between this case and any other case can exist because the Third Circuit's opinion was specifically deemed to be "not precedential." The Internal Operating Procedures for the Third Circuit provide insight into the weight and authority of the different types of opinions the Court

authors. Rule 5.1 recognizes that the Court issues two types of opinions: precedential and not precedential. A "not precedential" opinion is not published as a slip opinion. I.O.P. 5.3. In addition, such an opinion is designated as "not precedential" in the first instance because it appears to have value only to the parties and the trial court. I.O.P. 5.3 Internal Operating Procedure 5.7 provides that the Third Circuit ". . . does not cite to its not precedential opinions as authority." Further, "[s]uch opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing." I.O.P. 5.7 Thus, the conflict, if any, between *Winters* and *Isaacson* remains isolated to those two cases. The instant case has not joined the alleged discord as no courts or parties will rely upon it.

b. There is No Conflict with *Boyle* and/or *In re Joint*

The second conflict alleged in the Petition is between this case and two others: this Court's opinion in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); and the Second Circuit's opinion in *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990). Petitioners assert that the Third Circuit's decision in the case at hand conflicts with these cases by "invo[king] the government contractor defense . . . absent government-imposed specifications requiring the particular conduct asserted to violate state law." Once again, Petitioners misstate the proceedings in the courts below in order to manufacture a conflict. As noted repeatedly herein, the District Court (affirmed by the Court of Appeals) found that the government required the particular conduct (i.e., the use of asbestos) that

allegedly violated state law. Thus, to the extent that *Boyle* and *In re Joint* support the application of the government contractor defense in the presence of government-imposed specifications requiring the particular conduct allegedly giving rise to a violation of state law, this case is in complete accord.

The very posture of the instant case makes an assertion of conflict between it and the *Boyle* and *In re Joint* opinions untenable. At issue in both *Boyle* and *In re Joint* was the substantive applicability of the government contractor defense. In *Boyle*, the case was filed in federal court as a diversity action against the manufacturer of a military helicopter involved in the accidental death of a U.S. Marine co-pilot. Neither the federal officer removal statute nor any removal basis was at issue. Likewise, *In re Joint* dealt with the substantive applicability of the government contractor defense in the context of a motion for summary judgment by one of the defendants in a state law failure-to-warn action seeking recovery for injuries alleged to have occurred from exposure to asbestos-based cement used at the Brooklyn Navy Yard during World War II. Again, neither the federal officer removal statute nor any removal basis was at issue.

In contrast, where, as here, removal under the federal officer statute is challenged, the test is whether the defense asserted is *colorable*, not whether the defense is meritorious. *See: Mesa v. California*, 489 U.S. 121, 128-30 (1989). The validity of the defense itself has been called a "distinct subject" by this Court, which ". . . has no connection whatever with the question of jurisdiction." *Id.* at 128-29 (internal citations omitted).

Moreover, this Court, in *Watson*, declared that the federal officer removal statute is not to be construed narrowly. *Watson, supra* at 2304-05. Even if a removing defendant's entitlement to prevail on the merits of a federal defense such as the "government contractor defense" can be fairly questioned, the defendant's right to have the applicability of that defense decided in a federal forum cannot be questioned. *Watson, supra* at 2306-07. In other words, Duquesne Light is under no obligation to show, and the lower courts have never been tasked with finding, that the government contractor defense will absolve Duquesne Light from liability in this case in order for the removal to be justified. Rather, Duquesne Light need merely assert a colorable claim to this defense which it did in this case.

Neither the Third Circuit nor the District Court made any finding about Duquesne Light's entitlement to immunity based on this doctrine. Hence, as a matter of posture, no holding of either the District Court or the Third Circuit by implication, can be said to conflict with the *Boyle* or *In re Joint* decisions which address the merits of the defense and where it may properly provide immunity. In the instant case, the Third Circuit did not decide, even by implication, the same issue which the *Boyle* and *In re Joint* courts considered.

Moreover, as discussed above, even assuming that a conflict exists between the holdings of the lower courts in the instant case and the *Boyle* and *In re Joint* decisions, this Court's review is rendered entirely unnecessary as a result of the "not precedential" opinion issued by the Third Circuit. No real conflict can be created by a "not precedential" opinion.

3. The Court of Appeals Conformed with the Accepted and Usual Course of Judicial Proceedings

As discussed above, the most likely explanation for the lack of written opinion on the jurisdictional issue in the court below is that the Court of Appeals simply saw fit to rely on the District Court's thorough and able treatment of the subject matter jurisdiction issue. There is no substantive indication within its opinion that the Court of Appeals ignored the jurisdictional issue and proceeded directly to a consideration of the merits. Indeed, there is suggestion to the contrary in Footnote 3 of the opinion, wherein the Court specifically acknowledged the jurisdictional dispute between the parties. The Third Circuit simply deemed this issue unworthy of additional written analysis and treatment, as is the court's prerogative

Within its internal operating procedures, the Third Circuit specifically reserves the right to deem which cases and issues presented to them are worthy of treatment by written opinion. *See:* I.O.P. 6.2 and 4.2. Internal Operating Procedure 6.2 allows a panel of the Third Circuit to determine that no written opinion is necessary; it may simply enter a unanimous judgment order. Similarly, I.O.P. 4.2 provides that the members of the court will decide for themselves in what cases they will issue written opinions. Thus, the Court of Appeals was under no obligation to satiate Petitioners' desire for additional and different analysis from that of the District Court on the issue of subject matter jurisdiction. Lack of written treatment cannot be equated with lack of consideration. Nowhere within the Third Circuit's

opinion is it indicated or even suggested that the Court found no need to pass upon the jurisdictional issue as suggested by Petitioners. The Court of Appeals simply used its discretion to determine what issue would receive focus in its written opinion. The Court of Appeals could have affirmed the District Court without written opinion; instead, it chose to address only those issues it deemed worthy of written analysis.

The Court of Appeals' decision to expend its effort and ink on the dispositive issue before it is neither unusual nor improper. Courts, in their written opinions, frequently devote more attention to the issue(s) which ultimately dispose of a case. In this respect, the Third Circuit did not depart from a common, judicially efficient practice. It is clear that Petitioners desired additional and, in truth, *different* analysis regarding the propriety of Duquesne Light's removal based on the federal officer removal statute, but the Third Circuit's failure to give Petitioners all they had hoped for does not warrant intervention by this Court where the Court of Appeals acted properly and within its own discretionary parameters.

CONCLUSION

No important federal question is presented by this Petition for Writ of Certiorari, and no conflict between United States Courts of Appeals has, or could have, been created by the Third Circuit's nonprecedential opinion. Moreover, the Court's supervisory powers over the Courts of Appeals need not be exercised here as the manner of disposition by the Court of Appeals was entirely proper and within its discretionary powers. As such, Respondent, Duquesne Light Company, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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